

No. 15050

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant.

vs.

JAMES P. SANDERSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

The Jurisdictional Statement of the Case as set forth in Appellant's brief, P. 1, 2, is correct.

STATEMENT OF THE CASE

The Statement of the Case as set forth in Appellant's brief, P. 2 to 7 is substantially correct, except

as modified by Note 1, P. 4 and phrase beginning with last words R. 18.

ARGUMENT ON THE MERITS

The Appellant concedes that Eng Kam, the alien subject of the bond, arrived at San Francisco, California, in the fall of 1946 and applied for admission to the United States as a son of a veteran of the armed forces of the United States and therefore qualified for admission if the relationship was bona fide under the provisions of the Immigration Act then in force described as P. L. 271, 59 Stat. 659, 8 U.S.C. 232, 1945; that on October 26, 1946 the Board of Special Inquiry of the Immigration and Naturalization Service found that he had not sustained his burden of proving the alleged claim of relationship and therefore rejected and denied his application for admission.

It was timely urged and contended through administrative appeals that the hearing accorded Eng Kam on his application was unfair. The administrative process for appeal was exhausted. Pending further proceedings Eng Kam was released under a \$1,000 bond posted by Appellee.

It is evident that Eng Kam was entitled to his full rights as authorized by P. L. 271, *supra*, and certainly to a fair hearing.

The cardinal principle of statutory construction is to save and not to destroy. *United States v. Menasche*, 348 U.S. 528, 75 S.Ct. 513.

“* * * * it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; * * *.” *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U.S. 88, 33 S.Ct. 186, 187, citing various alien and immigration cases.

The foregoing opinion is supported by *Gonzales v. United States*, 348 U.S. 407, 75 S.Ct. 409.

In reversing an order of deportation on the ground of an unfair hearing it was held in *Takeo v. Manney*, 9 Cir., 160 Fed. (2d) P. 667, that:

“When, however, a hearing is had under a statute requiring a hearing, the hearing must conform to fair practices as they are known in Anglo-Saxon jurisprudence.”

Eng Kam was apprehended by an agent of the Appellant on March 28, 1952, and temporarily detained in the Immigration Station at Seattle, Washington. He brought habeas corpus proceedings in the United States District Court for the Western District of Washington, Northern Division on March 31, 1952. At the trial on June 9, 1952 it was determined that Eng Kam had not received a fair hearing before the Board of Special Inquiry in 1948 and the court ordered

the Writ of Habeas Corpus granted unless a fair rehearing was given Eng Kam within 30 days (R. 18).

In accordance with the Court's order, Eng Kam was given a hearing by a Board of Special Inquiry at Seattle on June 30, 1952 and on July 1, 1952 the said Board ordered that he be excluded. On appeal to the Board of Immigration Appeals at Washington, D. C. the appeal was sustained on April 21, 1953 and Eng Kam was finally admitted to the United States pursuant to the provisions of Public Law 271. (R. 18). The Board of Immigration Appeals is the highest administrative authority having jurisdiction over the admission of aliens.

Eng Kam was apprehended by Appellant on March 28, 1952 and brought Habeas Corpus proceedings on March 31, 1952. On April 12, 1952 Appellee advised the Commissioner of Immigration and Naturalization at Washington, D. C. that Eng Kam was then held in the custody of the Appellant in the Immigration Station at Seattle pending habeas corpus proceedings; that it was alleged that the hearing before the service was unfair and that if the court so held that the bond should not be forfeited. (R. 31). Receipt of the said letter was acknowledged under date of May 6, 1952 with the information that same would be sent to the Appellant at Seattle. (R. 32). On May

26, 1952 the Commissioner ordered the bond breached (R. 19); that on September 24, 1952 the Federal Reserve Bank of San Francisco, with whom the bond was deposited, received advice from the Appellant at Seattle to the effect that the bond should be redeemed, or forfeited, which was done. Four coupons of the value of \$50 was returned to Appellee. (R. 19). In view of the Commissioner's knowledge of the habeas corpus proceedings it would seem that the Appellant should have allowed the bond to remain in abeyance pending the decision.

The present Cause came on for trial on October 6, 1955. Some of the important points set forth in the Conclusions of Law are (R. 20-22):

The conditions of the bond required that Eng Kam be delivered for deportation when it was finally and legally determined that he was to be deported. Par. II.

That the hearing before the Board of Special Inquiry of 1948 which found Eng Kam inadmissible to the United States under Public Law 271 was unfair and improper and that the order of exclusion and deportation was improper. Par. III.

That the Order of the District Director demanding that Eng Kam be surrendered for deportation was unlawful; that there was no lawful requirement or obligation to surrender Eng Kam for deportation at any time. Par. IV.

That failure to deliver Eng Kam for deportation as against an unlawful and invalid order does not

constitute a breach of the conditions of the bond. Par. VII.

That there has been no breach in the bonding agreement which would entitle the Appellant to forfeit the bond.

That Eng Kam was found to be admissible under the provisions of Public Law 271 and Appellee is entitled to be exonerated as surety on the bond agreement. Par. IX.

The Judgment. It was adjudged and decreed that the Appellee have judgment against the Appellant in the sum of \$1,000 with interest at the rate of 4 per cent from date of judgment, plus costs entitled by statute.

The Appellant has cited Federal civil and criminal cases, Immigration cases and State cases but it is extremely doubtful if any of them are in point in that the facts in no case are similar to the present case.

The decision of the District Court on questions of fact are final, unless clearly erroneous. Rules of Federal Procedure, Title 28, Rule 52a.

If Eng Kam was entitled to be released under bond, the Appellant was without authority to add restrictions not authorized by the law in general. The Appellant was without authority to administratively breach or forfeit a bond posted in behalf of an alien. *Kubara v. United States*, 3 Cir., 89 Fed. (2d) 965, followed by *United States v. Western Surety Co.*, 9 Cir., 118 Fed. (2d) 703, wherein the court said:

“The appellant claims that the order of the Assistant Secretary that the bond be declared breached is final and not reviewable except for failure to afford a fair hearing or manifest abuse of power. No statute or regulation conferring such adjudicating power on the department officials has been cited. We agree with the decision in *Kubara v. United States*, 3 Cir., 89 F. (2d) 965 that it does not exist.”

The Appellant has recognized the foregoing decision but has not cited any acceptable authority to the contrary.

CONCLUSION

The very foundation of this proceeding is that the hearing accorded Eng Kam in 1948 was held by the District Court to be unfair and invalid. The Board of Immigration Appeals upheld the original exclusion order but on the second appeal ordered admission. If Eng Kam had been given a fair hearing in the first instance he would have been admitted and no bond would have been required, and the government would not have been put to any unnecessary expense. As the matter now stands the Government is endeavoring to profit through its own error. The judgment of the District Court is correct and should be affirmed.

Respectfully submitted.

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